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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In The Matter of

APPLICATION OF BELLSOUTH
CORPORATION, BELLSOUTH
TELECOMMUNICATIONS, INC. AND
BELLSOUTH LONG DISTANCE, INC.
FOR PROVISION OF IN-REGION,
INTERLATA SERVICES IN LOUISIANA

CC Docket No. 98-121

98-121

OPPOSITION
OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS
RESELLERS ASSOCIATION

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SUMMARY

The Telecommunications Resellers Association ("TRA"), a national trade association representing more than 650 entities engaged in, or providing products and services in support of, telecommunications resale, hereby respectfully urges the Commission to deny the Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively "BellSouth") for authority to provide interLATA service "originating" within the BellSouth "in-region State" of Louisiana. BellSouth has failed not only to satisfy the threshold requirements set forth in Section 271(c) for Bell Operating Company provision of "in-region," interLATA service, but has not demonstrated that grant of the authorization it seeks would be consistent with the public interest, convenience and necessity, as required by Section 271(d)(3)(C).

Among the deficiencies which preclude grant of the BellSouth Application are the following:

- BellSouth has not satisfied the threshold requirements of Section 271(c)(1). BellSouth cannot proceed under "Track A" because it has not shown that it is facing actual facilities-based competitors providing service to both business and residential customers exclusively or predominantly over their own facilities. BellSouth is mistaken in its belief that the facilities-based provision of service by one or more competitors to business customers alone is sufficient to satisfy "Track A." BellSouth is also incorrect in its view that PCS service constitutes an actual commercial alternative to wireline local exchange service. Because PCS largely complements, rather than substitutes for, wireline local exchange service and because the presence of PCS providers reveals nothing regarding BellSouth's compliance with Congressional market-opening directives, PCS cannot be used for "Track A" compliance purposes.
- BellSouth has not fully satisfied the 14-point "competitive checklist". TRA's resale carrier members report that little if any improvements have been effected in BellSouth's wholesale operation since the carrier last sought in-region, interLATA authority in the State of Louisiana and that many number of the problems which caused the Commission to reject BellSouth's earlier-filed application remain.
- BellSouth has not demonstrated that the public interest would be served by its entry into the in-region, interLATA market prior to the emergence of meaningful facilities-based local exchange/exchange access service alternatives.

- The Commission may and should consider in its public interest analysis BellSouth's refusal to make available to new market entrants existing combinations of network elements

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**OPPOSITION OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Public Notice, DA 98-1364 (released July 9, 1998), and Public Notice, DA 98-1480 (released July 23, 1998), hereby opposes the application ("Application") filed by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively "BellSouth") under Section 271(d) of the Communications Act of 1934 ("Communications Act"),¹ as amended by Section 151 of the Telecommunications Act of 1996 ("Telecommunications Act")² for authority to provide interLATA service "originating" within the BellSouth "in-region State" of

¹ 47 U.S.C. § 271(d).

² Pub. L. No. 104-104, 110 Stat. 56, § 151 (1996).

Louisiana.³ As TRA will demonstrate below, BellSouth has once again failed not only to satisfy the threshold requirements set forth in Section 271(c) for Bell Operating Company ("BOC") provision of in-region, interLATA service,⁴ but has not demonstrated that grant of the authorization it seeks would be consistent with the public interest, convenience and necessity, as required by Section 271(d)(3)(C).⁵ Given that the Commission cannot, therefore, make the affirmative findings required by Section 271(d)(3), TRA submits that the BellSouth Application cannot be granted. TRA, accordingly, urges the Commission to deny BellSouth the in-region, interLATA authority it seeks here.

I.

INTRODUCTION

A national trade association, TRA represents more than 650 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the

³ An "in-region State" is "a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before the date of enactment of the Telecommunications Act of 1996." 47 U.S.C. § 271(i)(1).

⁴ 47 U.S.C. § 271(c). The Commission denied BellSouth's initial application for in-region, interLATA authority in the State of Louisiana in Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Louisiana (Memorandum Opinion and Order), 13 FCC Rcd. 6245, ¶ 21 (released Dec. 24, 1997), *recon. pending, appeal pending sub nom. BellSouth Corporation v. FCC*, No. 98-1087 (D.C.Cir. March 6, 1998), *stipulation of dismissal pending*.

⁵ 47 U.S.C. § 271(d)(3)(C).

telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. TRA's resale carrier members currently provide interLATA and intraLATA interexchange, local, international, wireless, internet and a variety of enhanced services to tens of millions of residential and small to mid-size business consumers across the nation.

Recognizing the need to provide their customers with a full range of service offerings, TRA's resale carrier members have been in the vanguard of competitive providers seeking to enter the local telecommunications market. A year ago, a third of TRA's resale carrier members reported that they were providing, or attempting to provide, competitive local exchange service, while an additional third reported plans to enter the local market within twelve months.⁶ TRA's resale carrier members are currently providing, or attempting to provide, competitive local exchange service in 44 states. The largest numbers of TRA resale carrier members are operating in local markets in the States of Florida and New York, with secondary concentrations in the States of California, Georgia, Illinois, Kentucky, Massachusetts, North Carolina, Tennessee, Texas, Virginia, Washington and Wisconsin.⁷ Louisiana falls among the states with the lowest numbers of TRA resale carrier members reporting current operations. The majority of TRA's resale carrier members are providing local exchange service exclusively through resale, although roughly a third are making some use of

⁶ Telecommunications Resellers Association, "1997 Reseller Membership Survey and Statistics" at 1, 15.

⁷ Telecommunications Resellers Association, "Member Survey of Local Competition," pp. 2, 4 (April, 1998).

unbundled network elements.⁸ More than a fifth of the local service customers served by TRA's resale carrier members are residential users.⁹

Some of TRA's resale carrier members, accordingly, are already direct competitors of BellSouth in local markets in Louisiana and across BellSouth's nine-state region, while others will follow as remaining obstacles to the competitive provision of local exchange service are eliminated. Virtually all of TRA's resale carrier members will be direct competitors of BellSouth in its provision of in-region, interLATA services once the carrier is authorized to provide such services. Moreover, TRA's resale carrier members providing local service in Louisiana and throughout BellSouth's nine-state region are reliant upon BellSouth for wholesale services and access to unbundled network elements, while virtually all of TRA's resale carrier members depend upon BellSouth for exchange access services.

TRA's interest in this matter is thus in protecting, preserving and promoting competition within the interexchange market, as well as in speeding the emergence and growth of resale, non-facilities-based, and ultimately facilities-based competition in local exchange/exchange access markets within the State of Louisiana and elsewhere. TRA fervently believes that permitting premature entry by any of the BOCs, including BellSouth, into the in-region, interLATA market would jeopardize the vibrant and dynamic competition that now characterizes the interexchange market, and retard the emergence and development of competitive local exchange/exchange access markets across the nation.

⁸ Id. at 5.

⁹ Id. at 8 - 10.

As the Commission has recognized, there are a host of ways in which control of local exchange/exchange "bottlenecks" can be leveraged by the BOCs and other incumbent LECs to disadvantage interexchange carrier rivals.¹⁰ The Commission has further recognized that the BOCs

¹⁰ See, e.g., Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, 11 FCC Rcd. 21905, ¶ 7 - 13 (1996), *recon.* 12 FCC Rcd. 2297 (1997), *pet. for rev. pending sub nom. SBC Communications Corp. v. FCC*, Case No. 97-1118 (D.C. Cir. Mar. 6, 1997), *remanded in part sub nom. Bell Atlantic Tel. Cos. v. FCC*, Case No. 97-1067 (D.C. Cir. Mar. 31, 1997), *further recon on remand FCC 97-222* (released June 24, 1997), *aff'd sub nom Bell Atlantic Tel. Cos. v. FCC*, Case No. 97-1067 (D.C. Cir. Dec. 23, 1997). As described by the Commission:

If a BOC is regulated under rate-of-return regulation, a price caps structure with sharing (either for interstate or intrastate services), a price caps scheme that adjusts the X-factor periodically based on changes in industry productivity, or if any revenues it is allowed to recover are based on costs recorded in regulated books of account, it may have an incentive to allocate improperly to its regulated core business costs that would be properly allocated to its competitive ventures. . . . In addition, a BOC may have an incentive to discriminate in providing exchange access services and facilities that its affiliate's rivals need to compete in the interLATA telecommunications services and information services markets. For example, a BOC may have an incentive to degrade services and facilities furnished to its affiliate's rivals, in order to deprive those rivals of efficiencies that its affiliate enjoys. Moreover, to the extent carriers offer both local and interLATA services as a bundled offering, a BOC that discriminates against the rivals of its affiliates could entrench its position in local markets by making these rivals' offerings less attractive. . . . Moreover, if a BOC charges other firms for inputs that are higher than the prices charged, or effectively charged, to the BOC's section 272 affiliate, then the BOC could create a 'price squeeze.' In that circumstance, the BOC affiliate could lower its retail price to reflect its unfair cost advantage, and competing providers would be forced either to match the price reduction and absorb profit margin reductions or maintain their retail prices at existing levels and accept market share reductions. This artificial advantage may allow the BOC affiliate to win customers even though a competing carrier may be a more efficient provider in serving the customer. Unlawful discriminatory preferences in the quality of the service or preferential dissemination of information provided by BOCs to their section 272 affiliates, as a practical matter, can have the same effect as charging unlawfully discriminatory prices. If a BOC charged the same rate to its affiliate for a higher quality access service than the BOC charged to unaffiliated entities for a lower quality service . . . the BOC could effectively create the same 'price squeeze' discussed above.

and other incumbent LECs can erect a variety of economic and operational barriers to competitive entry into, and competitive survival in, the local telecommunications market, thereby rendering it difficult, if not impossible, for competitive providers, particularly small carriers, to provide alternative sources of local service.¹¹

Confirming the accuracy of the latter assessment, TRA's resale carrier members report encountering a host of obstacles to local service resale. Indeed, a number of the earliest market entrants have already exited the local market, having concluded that the quality of local service which they were able to provide jeopardized existing relationships with their interexchange and other customers. Not surprisingly then, in response to a recent TRA survey of its members engaged in the resale of local exchange service, respondents reported that two of the three most

¹¹ See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶¶ 10 - 23 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, 12 FCC Rec. 12460 (1997), *aff'd/vacated in part sub. nom. Iowa Util. Bd v. FCC*, 120 F.3d 753 (1997), *writ of mandamus issued* 135 F.3d 535 (8th Cir. 1998), *cert. granted sub. nom AT&T Corp. v. Iowa Util. Bd* (Nov. 17, 1997), *pet. for rev. pending sub. nom., Southwestern Bell Tel. Co. v. FCC*, Case No. 97-3389 (Sept. 5, 1997). Among other things, the Commission has noted:

An incumbent LEC . . . has the ability to act on its incentive to discourage entry and robust competition by not interconnecting its network with the new entrant's network or by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to the incumbent LEC's subscribers. . . . Vigorous competition would be impeded by technical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs. . . . This Order addresses other operational barriers to competition, such as access to rights of way, collocation, and the expeditious provisioning of resale and unbundled elements to new entrants. The elimination of these obstacles is essential if there is to be fair opportunity to compete in the local exchange and exchange access markets.

serious impediments to their ability to compete in the local market involved deficiencies in the service they received from incumbent LECs. Thus, survey respondents identified as the three principal factors impeding their ability to compete in the local market as:

- (i) Inadequate operations support systems;
- (ii) Inadequate service levels provided by incumbent LECs to resale providers;
and
- (iii) Inadequate discounts or margins.

As the last thirty months have demonstrated, monopolists do not readily relinquish market power; theoretically "contestable" markets cannot be transformed overnight by mere legislation or regulatory declaration into actually "contested" markets.¹² Unless there exists a potent countervailing incentive or disincentive to do otherwise, it can be anticipated that the BOCs, including BellSouth, will continue to actively seek to forestall local exchange/exchange access competition as a profit maximizing strategy. And given past practices, it can also be anticipated that the BOCs, including BellSouth, will utilize their "bottleneck" control of exchange access facilities to disadvantage interexchange competitors.¹³

TRA submits that the BOCs' market conduct will be adequately disciplined only when viable facilities-based competition has emerged in the local exchange/exchange access market and that the only incentive that may be strong enough to motivate the BOCs to permit such facilities-

¹² See, e.g., *id.*

¹³ See, e.g., *United States v. Western Electric Co.*, 767 F.Supp. 308, 322 (D.D.C. 1991) ("Where the Regional Companies have been permitted to engage in activities because it appeared to the Court that the likelihood of anticompetitive conduct was small, they have nevertheless already managed to engage in such conduct . . .").

based competitive entry is their desire to provide in-region, interLATA services. As succinctly stated by the Commission:

We find that incumbent LECs have no economic incentive, *independent of the incentives set forth in sections 271 and 274 of the 1996 Act*, to provide potential competitors with opportunities to services.¹⁴

Thus, the Commission reasoned, "Section 271 . . . creates a critically important incentive for BOCs to cooperate in introducing competition in their historically monopolized local telecommunications markets."¹⁵

Hence, the public interest would not be served by sanctioning origination of interLATA traffic by BellSouth within the "in-region State" of Louisiana until the bulk of the residents of the State are able to select among multiple facilities-based providers of local exchange/exchange access service. In other words, BellSouth should not be awarded the authority it seeks here until it is facing viable facilities-based competition in at least the major population centers within the State of Louisiana. Certainly, BellSouth should not be granted such authority until the carrier has "taken real, significant, and irreversible steps to open . . . [its] markets [to competition]" and those markets are indeed "open to competition."¹⁶

The Commission has an opportunity to realize the Congressional vision reflected in the Telecommunications Act of an integrated, fully competitive telecommunications marketplace.

¹⁴ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 55 (emphasis added).

¹⁵ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543, ¶ 14 (1997).

¹⁶ Id.

That opportunity should not be lost by simply giving away the "carrot" relied upon by Congress to prompt "the opening [of] all telecommunications markets to competition."¹⁷ As the Commission has recognized, "in the absence of . . . incentives . . . directed at compelling incumbent LECs to share their economies of scale and scope with their rivals, it would be highly unlikely that competition would develop in local exchange and exchange access markets to any discernable degree."¹⁸

II.

ARGUMENT

A. Procedures For Reviewing BOC Applications For In-Region, InterLATA Authority Under Section 271

Within ninety days following submission by a BOC of an application to provide interLATA services originating (or in the case of inbound and private line services, terminating) within a State in which the BOC provides local exchange/exchange access service as an incumbent LEC, the Commission must issue a written determination approving or denying the application.¹⁹ In undertaking that review, the Commission must consult with, and give "substantial weight" to the recommendations of the U.S. Department of Justice;²⁰ the Commission must also consult with the telecommunications regulatory authority of the State that is the subject of the BOC application to

¹⁷ S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) ("Conference Report").

¹⁸ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543 at ¶ 18.

¹⁹ 47 U.S.C. § 271(d)(3).

²⁰ 47 U.S.C. § 271(d)(2)(A).

verify the compliance of the applying BOC with the requirements for providing in-region, interLATA services set forth in Section 271(c),²¹ although the State Commission's views are not dispositive as to these matters.²²

The Commission may not grant a BOC application for in-region, interLATA authority unless it makes an affirmative determination that the applying BOC has met the requirements of Section 271(c)(1) and (2) for the State for which authorization is sought, including: (i) a showing that either the BOC is providing, pursuant to one or more binding agreements approved by the State Commission under Section 252, access and interconnection to its facilities for the network facilities of one or more unaffiliated competitors that are providing telephone exchange services to both residential and business subscribers exclusively or predominantly over their own landline telephone exchange service facilities, or, if no such unaffiliated facilities-based competitors have requested such network access and interconnection, the BOC is offering to provide such access and interconnection pursuant to a Statement of Generally Available Terms and Conditions ("SGATC") approved or permitted to take effect by the State Commission, and (ii) a demonstration that it has fully implemented in one or more access and interconnection agreements with facilities-based competitors or offered in a SGATC all fourteen items included on the "competitive checklist."²³ For the Commission to determine that a BOC has fully satisfied the 14-point

²¹ 47 U.S.C. § 271(d)(2)(A).

²² Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma (Memorandum Opinion and Order), 12 FCC Rcd. 8685, ¶ 15 (June 26, 1997), *pet. for rev. pending sub nom. SBC Communications Corp. v. FCC*, Case No. 97-1425 (D.C. Cir. July 3, 1997).

²³ 47 U.S.C. §§ 271(c), 271(d)(3)(A).

"competitive checklist," the BOC must have provided competitive LECs with (i) physical interconnection of network facilities at cost-based rates, (ii) nondiscriminatory access at cost-based rates to unbundled network elements, including local loop, local transport, local switching, and database and associated switching, as well as to poles, ducts, conduits and other rights of way, 911 and E911 service, directory assistance, operator call completion services and white pages directory listings, (iii) viable interim telecommunications number portability, (iv) local dialing parity, (v) reciprocal compensation arrangements, and (vi) opportunities to resell all retail service offerings at wholesale rates reflective of reasonably avoidable costs.²⁴

Before granting a BOC application for in-region, interLATA authority, the Commission must further make an affirmative determination that any authorization it grants to the applying BOC will be carried out in accordance with the structural and transactional requirements, nondiscrimination safeguards, audit obligations and marketing restrictions set forth in Section 272.²⁵ And critically, the Commission must find that grant of the requested in-region authority is consistent with the public interest, convenience and necessity.²⁶

B. BellSouth Has Failed To Make The Threshold Showing Required By Section 271(c)(1)

As noted above, a BOC seeking in-region, interLATA authority pursuant to Section 271 must make the threshold showing that it is either (i) facing actual facilities-based competition in the State as required by Section 271(c)(1)(A); or (ii) is entitled to proceed under Section

²⁴ 47 U.S.C. § 271(c)(2)(B).

²⁵ 47 U.S.C. §§ 271(d)(3)(C); 272.

²⁶ 47 U.S.C. § 271(d)(3)(C).

271(c)(1)(B) because it has not received a "qualifying request" from a "potential competitor . . . that, if implemented, . . . [would] satisfy section 271(c)(1)(A)."²⁷ BellSouth has made neither showing here. By its own admission, BellSouth is unable to demonstrate the presence of facilities-based provider serving both business and residential customers in the State of Louisiana,²⁸ other than providers of personal communications service ("PCS"), and thus cannot make the requisite "Track A" showing.²⁹ Further, BellSouth admittedly is a party to scores of binding interconnection agreements.³⁰ The BellSouth is thus precluded from seeking entry under "Track B."

1. BellSouth Misreads Section 271(c)(1)(A)

BellSouth opines that the Section 271(c)(1)(A) requirement that a BOC must document the presence of a facilities-based competitor can be satisfied by a demonstration that one or more alternative providers are providing services over their own facilities solely to business customers. According to BellSouth, "where a CLEC or combination of CLECs provides service to both residential and business subscribers, Track A does not require that both classes of subscribers be served on a facilities basis."³¹ BellSouth's loose interpretation of Section 271(c)(1)(A), which stands in sharp contrast with its and the other BOCs' and incumbent LECs' generally strict

²⁷ 47 U.S.C. § 271(c)(1)(A) & (B); Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma (Memorandum Opinion and Order), 12 FCC Rec. 8685 at ¶ 54.

²⁸ BellSouth Brief at 7

²⁹ Id. at 9 - 15.

³⁰ Id. at 4.

³¹ Id. at 7.

constructionist approach to the Telecommunications Act of 1996,³² conflicts with the express terms of the provision and, accordingly, cannot be accepted.

Section 271(c)(1)(A) makes clear that in order to meet the threshold requirement for grant of in-region, interLATA authority, a BOC must document the presence of "one or more unaffiliated competing providers of telephone exchange service . . . to *residential and business subscribers*" and that "such telephone exchange service . . . [must] be offered by such competing providers either *exclusively* over their own telephone exchange service facilities or *predominantly* over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier." While it has held that to meet this requirement a BOC need not show that a single carrier is providing service over its own facilities to both business and residential customers,³³ the Commission has made clear that Section 271(c)(1)(A) requires a BOC relying upon multiple carriers to make its Track A showing to document that those carriers collectively are providing service over their own facilities to both residential and business customers.³⁴

Review of the Conference Report confirms this assessment. In discussing "facilities based competition," the Conference Report repeatedly emphasizes "local residential competition."³⁵

³² See, e.g., Iowa Util. Bd v. FCC, 120 F.3d 753, 794 (8th Cir. 1997), *writ of mandamus issued* 135 F.3d 535 (8th Cir. 1998), *cert. granted sub. nom AT&T Corp. v. Iowa Util. Bd*, 118 S.Ct. 879 (U.S. 1998).

³³ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543 at ¶ 82.

³⁴ Id. at ¶ 102.

³⁵ Conference Report at 148.

And then having discussed the possibility of "meaningful facilities-based competition" in the context of passage of 95 percent of American homes by cable television facilities, the Conference Report reemphasizes that "[f]or purposes of section 271(c)(1)(A), the BOC must . . . [be] providing access and interconnection to one or more competitors providing telephone exchange service to residential and business subscribers."³⁶

Given the differing economics, as well as operational requirements, involved in the provision of service to residential versus business customers,³⁷ it makes eminent sense from a public policy perspective to require as part of a BOC's Track A showing documentation of the presence of both facilities-based business and facilities-based residential competition. A local market cannot be said to be truly open to competitive entry until the various economic and operational impediments to the provision of service to all market segments have been eliminated and alternative providers are able to offer service to not only business, but residential, customers. To paraphrase the Commission, the "most probative evidence" that all barriers to facilities-based competitive entry have been removed is that facilities-based competitors are "actually offering competitive local telecommunications services," among other things, "to different classes of customers (residential and business)."³⁸

³⁶ Id.

³⁷ For example, residential customers generally generate less revenues per account, while imposing greater operational, as well as customer service, demands on carriers, leaving competitors less able to absorb additional costs occasioned by deficiencies in incumbent LEC operations support systems.

³⁸ Id. at ¶ 391.

BellSouth concedes that of the "approximately 4,282 local exchange service lines in Louisiana" which "6 wireline facilities-based CLECs" are purportedly providing "utilizing their own networks," "less than 10 . . . appear to provide wireline local exchange service to residential customers."³⁹ This "small quantity of facilities-based residential lines" are purportedly served by KMC Telecom,⁴⁰ although it appears that BellSouth is unwilling to attest to this. As the Commission has recognized, "Section 271 places on the applicant the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied."⁴¹ Here, the suggestion that "less than 10 of . . . [the] facilities-based lines appear to provide wireline local exchange service to residential customers" does not constitute the *prima facie* showing that a BOC must make in order to satisfy its threshold burden of "plead[ing], with appropriate supporting evidence, facts, which if true, are sufficient to establish that the requirements of section 271 have been met."⁴²

Moreover, as the Commission has further recognized, "there may be situations where a new entrant may have a commercial presence that is so small that the new entrant cannot be said to be an actual commercial alternative to the BOC, and therefore, not a 'competing provider.'"⁴³ A competitor that is providing service to less than ten residential lines can hardly be said to be "in the

³⁹ BellSouth Application at Appendix A, Tab 28, Affidavit of Gary M. Wright at ¶ 66.

⁴⁰ *Id.* at ¶ 91.

⁴¹ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order, 12 FCC Rcd. 20543 at ¶ 43.

⁴² *Id.* at ¶ 44, fn. 85.

⁴³ *Id.* at ¶ 77.

market."⁴⁴ It has been the experience of TRA's resale carrier members that obtaining new local service customers is not difficult; difficulties tend to arise in implementing service to those customers through incumbent LECs. Hence, an absence of residential customers among facilities-based providers suggests the continued presence of economic and operational barriers to market entry.

2. BellSouth's Reliance Upon PCS is Misplaced

Apparently recognizing that its Track A showing is otherwise inadequate on its face,, BellSouth, pointing to "the estimated total of 35,000 subscribers" served by "AT&T, Sprint Spectrum, PrimeCo, MereTel, and PowerTel," contends that it is "eligible for Track A relief based on the existence of [personal communications service ("PCS")] . . . carriers in Louisiana."⁴⁵ Based on a highly suspect survey and a gerry-rigged comparative price analysis, BellSouth argues that the "transition from wireline to wireless has already occurred for many thousands of customers." Because "in Louisiana, PCS is a viable alternative to wireline local service," BellSouth declares, "through this service alone, BellSouth satisfies Track A."⁴⁶ TRA strongly disagrees.

The Commission has held that while "section 271 does not preclude the Commission from considering the presence of a PCS provider in a particular state as a 'facilities-based competitor'," an applicant seeking to rely upon PCS for Track A compliance "must demonstrate that

⁴⁴ Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma (Memorandum Opinion and Order), 12 FCC Rcd. 8685 at ¶ 17.

⁴⁵ BellSouth Brief at 9 - 10.

⁴⁶ Id. at 15.

PCS provider on which the applicant seeks to rely to proceed under section 271(c)(1)(A) offers service that both satisfies the statutory definition of 'telephone exchange service' in section 3(47)(A) and competes with the telephone exchange service offered by the applicant in the relevant state."⁴⁷ By way of explanation, the Commission noted that PCS must be "an actual commercial alternative to the BOC," rather than a "complementary telecommunications service."⁴⁸

TRA submits, however, that the questions the Commission must address in addressing BellSouth's reliance on PCS for Track A compliance should not be limited to whether PCS is telephone exchange service or whether PCS is a meaningful alternative to wireline local exchange service, although these are important considerations. In TRA's view, the issue that must ultimately be resolved is whether the presence of PCS providers in a local market is meaningful in the context of Section 271 and the purpose for which that provision was incorporated into the Telecommunications Act. In other words, the fundamental inquiry should be whether the availability of PCS confirms that the will of Congress that all barriers to competitive entry into BellSouth's local markets in Louisiana be eliminated before the carrier is authorized to originate interLATA service in that State has been realized.

In "enact[ing] the sweeping reforms contained in the 1996 Act, . . . Congress . . . sought to open local telecommunications markets to *previously precluded competitors* not only by removing legislative and regulatory impediments to competition, but also by reducing inherent

⁴⁷ Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Louisiana (Memorandum Opinion and Order), 13 FCC Rcd 6245 at ¶¶ 72 - 73.

⁴⁸ Id. at ¶ 73.

economic and operational advantages possessed by incumbents."⁴⁹ Congress established "Track A" as "the primary vehicle for BOC entry in section 271" in order to speed such previously foreclosed competitive entry into the local exchange market.⁵⁰ As proclaimed in the House Committee Report, the existence of a facilities-based competitive provider of local exchange service was thought to constitute "tangible affirmation that the local exchange is indeed open to competition."⁵¹

PCS providers do not fall into the universe of "previously precluded competitors." Entry by PCS providers into the State of Louisiana was not facilitated by "remov[al] of legislative and regulatory impediments." "[E]limination of economic and operational barriers to entry" was not necessary to allow for the provision of service by PCS providers within the State of Louisiana.⁵² Provision of PCS in the State of Louisiana is not "dependent . . . upon the BOCs' cooperation in the nondiscriminatory provisioning of interconnection, unbundled network elements and resold services pursuant to the pricing standards established in the statute."⁵³ Indeed, PCS provider entry into the State of Louisiana would have occurred in a "situation . . . largely unchanged from what prevailed

⁴⁹ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543 at ¶ 13 (emphasis added).

⁵⁰ Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma (Memorandum Opinion and Order), 13 FCC Rcd 6245 at ¶ 41

⁵¹ H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1 at 76 - 77 ("House Report").

⁵² Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543 at ¶ 11.

⁵³ Id. at ¶ 14.

before passage of the 1996 Act," with or without compliance by the BOCs with the "competitive checklist."⁵⁴

In light of the above, TRA submits that the Commission should set high the bar a BOC must hurdle in demonstrating that PCS is a "telephone exchange service" and an "actual commercial alternative" to wireline service. While Congress and the Commission have recognized that providers of cellular radiotelephone ("cellular") service, PCS and certain 800 MHZ and 900 MHZ specialized mobile radio ("ESMR") services offer exchange and exchange access services, both declined to classify any of these wireless providers as local exchange carriers.⁵⁵ The Commission declined to so classify wireless providers because "wireless local loops have [not yet] begun to replace wireline local loops for the provision of local exchange service."⁵⁶ Certainly, the Commission has recognized that wireless services could "potentially extend, replace, and compete with wireline local exchange services."⁵⁷ Indeed, in allowing wireless "licensees to offer fixed services over CMRS spectrum," the Commission sought to "establish a framework that will stimulate wireless competition in the local exchange market."⁵⁸ It nonetheless determined that it would be premature to determine regulatory treatment of such competitive offerings because they

⁵⁴ Id. at ¶ 18.

⁵⁵ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 1004.

⁵⁶ Id. at ¶ 1005.

⁵⁷ Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services (First Report and Order), 11 FCC Rcd. 8965, ¶ 6 (1996).

⁵⁸ Id. at ¶ 3.

have yet to emerge.⁵⁹ A year later, the Commission concluded that "fixed wireless service has developed to the point where it has *the potential* to provide a competitive alternative to the incumbent LEC network,"⁶⁰ but felt it necessary to release a *Notice of Inquiry* to "explore means of encouraging and facilitating competition in the local exchange telephone market" by wireless service providers.⁶¹

Is PCS an "actual commercial alternative" to wireline local exchange service, or does it still "largely complement, rather than substitute for, wireline local exchange"⁶² TRA submits that given the critical differences between PCS and wireline local exchange service, the answer is clearly the latter. For example:

- In virtually all instances, PCS remains significantly more expensive than wireline local exchange service.⁶³

⁵⁹ Id. at ¶¶ 46 - 57.

⁶⁰ Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services (Report and Order), 12 FCC Rcd. 15668, ¶ 54 (1997) (emphasis added).

⁶¹ Calling Party Pays Service Option in the Commercial Mobile Radio Services (Notice of Inquiry), 12 FCC Rcd. 17693, ¶ 1 (1997).

⁶² Application of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries Memorandum Opinion and Order, 12 FCC Rcd. 19985, ¶ 90 (1997).

⁶³ "Wireless telephone service prices will have to fall well over 50 percent for wireless service to be fully price-competitive with traditional telephone service." Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 (Second Annual Report), 12 FCC Rcd. 11266, 11323, 11324 (1997).

- Unlike wireline local exchange service, users of PCS pay for incoming, as well as outgoing, calls.⁶⁴
- Unlike wireline local exchange service, users of PCS pay for a portion of every "800" and "888" call.
- Unlike wireline local exchange service, PCS does not provide residential users with the ability to make unlimited calls for a fixed monthly charge.
- Unlike wireline local exchange service, PCS requires that each handset must have a separate calling plan.
- PCS handsets are generally significantly more expensive than telephones used for residential service.
- The predominant trait of PCS -- *i.e.*, its mobility -- renders it less useful as a substitute for local exchange service because the removal of the PCS handset from a residence would deny the household phone service, including the ability to call police and other emergency services.

BellSouth, however, suggests that the price differential between PCS and wireline local exchange service has narrowed to the extent that the former has become a meaningful alternative for the latter. Once again, TRA disagrees. Initially, it is noteworthy that the only way that BellSouth can lay claim to any comparability in pricing between PCS and wireline local exchange service is to enhance the latter with a number of "bells and whistles." Thus, BellSouth bundles into the "cost" of wireline local exchange service not only short-haul long distance, but such vertical features as call waiting, caller ID, call forwarding, 3-way calling and voice mail. As BellSouth concedes, "it would not be meaningful to compare the cost of the PCS option with the cost

⁶⁴ "A fundamental difference between wireline and wireless service is that currently a U.S. wireline telephone subscriber does not pay any additional charges to receive telephone calls, whereas most CMRS telephone subscribers pay a per minute charge to receive calls." Calling Party Pays Service Option in the Commercial Mobile Radio Services (Notice of Inquiry), 12 FCC Rd. 17693, ¶ 2. While the Commission theorized that widespread use of calling party pays ("CPP") service might narrow these differences, it noted that CPP is not broadly available and is not available at all in the State of Louisiana.